Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

SHORE CLUB CONDOMINIUM ASSOCIATION, INC., also known as SC CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the domestic service exclusion under Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3) is violated by the unionization of individuals employed in the domestic service of families or persons at their homes, when such families or persons live in condominiums, a form of home ownership recognized under Florida law.

2. Whether the National Labor Relations Board's assertion of jurisdiction over domestics employed directly by a non-profit condominium association is prohibited by Florida constitutional and statutory provisions and by the United States Constitutional provisions prohibiting violations of state sovereignty, the rights retained by the people, as well as takings and due process requirements.

LIST OF PARTIES

The parties below are listed in the caption. In addition, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local Union No. 390, AFL-CIO ("IBT"), initiated and appeared in the initial NLRB Representation proceedings. The IBT, however, did not continue to actively participate in this case thereafter.

CORPORATE DISCLOSURE STATEMENT

The Shore Club Condominium Association is a non-profit Florida corporation and operates as required by the provisions of the Florida Condominium law; it consists of those who are unit owners of the individual dwelling units, and the common spaces, in their condominium.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Shore Club Condominium Association, Inc. v. NLRB*, 400 F.3d 1336 (11th Cir. 2005). Appendix A at 1a-8a. The Eleventh Circuit affirmed the NLRB's Decision and Order, dated September 30, 2003. *In re Shore Club Condo. Ass'n, Inc.*, 340 NLRB No. 82 (N.L.R.B. Sep. 30, 2003). Appendix B at 9a-17a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit, App. A at 1a-8a, was entered on February 28, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States of America:

Amendment V.

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment IX.

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Amendment X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Constitution of the State of Florida

Article VII, Section 6(a)

Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependant upon the owner, shall be exempt from taxation thereon . . . The real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a lease-hold initially in excess of ninety-eight years.

The National Labor Relations Act
29 U.S.C. § 152(3) – Definitions

The term 'employee' . . . shall not include any individual employed . . . in the domestic service of any family or person at his home. . . .

Florida Statutes

§ 718.102, Florida Statutes (2004)

Purposes – The purpose of this chapter is: (1) To give statutory recognition to the condominium form of ownership of real property.

§ 718.111, Florida Statutes (2004)

The Association – (1) Corporate Entity – (a) The operation of the condominium shall be by the association, which must be a Florida corporation for profit or a Florida corporation not for profit . . . The owners of units shall be shareholders or members of the association. The officers and directors of the association have a fiduciary relationship to the unit owners. It is the intent of the Legislature that nothing in this paragraph shall be construed as providing for or removing a requirement of a fiduciary relationship between any manager employed by the association and the unit owners . . . * (c) A unit owner does not have any authority to act for the association by reason of being a unit owner.

§ 718.116, Florida Statutes (2004)

Assessments; liability; lien and priority; interest; collection. – (1)(a) A unit owner, regardless of how his or her title has been acquired, including by purchase at a foreclosure sale or by deed in lieu of foreclosure, is liable for all assessments which come due while he or she is the unit owner.

STATEMENT OF THE CASE

I. The Condominium Association.

Shore Club Condominium Association ("Condominium Association") is a not-for-profit condominium association made up of homeowners who, pursuant to the laws of the State of Florida, are able to own and retain individual homeowner legal rights in a vertical fashion, through a condominium ownership structure, which is located in Fort Lauderdale, Florida. App. A at 2a. A portion of the condominium property – with two towers over a parking lot pedestal in which there are homes stacked vertically, in what are known as condominium units – is west of the A1A highway. *Id.*; App. C at 19a. Another portion including a pool and recreational area is east of A1A, on the beach adjacent to the Atlantic Ocean (and is directly east, or across A1A, from the residential units of the homeowners in the towers). App. A at 2a. The owners have their home units in the two towers and have undivided ownership access to the common areas – which include:

A. the pedestal on the property which includes the grounds, the parking lot (which is built up and on top of which are parking spaces, open areas and structures) and the various common areas adjacent to and surrounding the buildings;

B. the elevators which go directly to the homeowners' doors on each floor (because of the way the elevators are set up so that there are no long hallways), as well as the catwalks along the outside of the buildings; and

C. the recreational area east across the street, which includes a pool, a structure and additional beachfront property. See App. A at 2a.

The condominium homeowners pay dues, security and assessments pursuant to Florida condominium law for the maintenance and security of their individual homes and common areas. § 718.116, Florida Statutes (2004).[1] The resident manager who works for a condominium association (and the Condominium Association's Resident Manager here) is subject to licensing and qualification requirements pursuant to State law because they are in positions of trust involving condominiums, which are considered home dwellings. The residential condominium units at issue here are entitled to and receive homestead exemptions, as well as other benefits that homeowners of residential homes have, because the State of Florida has chosen to establish the laws, so that homes can be vertically stacked and this type of homeownership can exist.

II. The Proceedings Before The NLRB.

The events leading to the filing of this petition began on April 3, 2003, when the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 390, AFL-CIO (IBT) petitioned the National Labor Relations Board (NLRB), seeking certification as the collective-bargaining representative of a unit of individuals in "domestic service" of families and

1. Judicial notice can be taken of the applicable legal requirements and provisions, which include Article VII, Section 6(a) of the Constitution of the State of Florida (homestead exemption for condominium owners) and Chapter 718, "Condominiums" of the Florida Statutes (and Parts I, II, III, IV, *et seq.* thereof).

persons at their homes in the Condominium Association. App. A at 2a. The Condominium Association argued that Section 2(3) of the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* precluded unionization of domestic employees working for a family or person at their home or dwelling. *Id.* The Regional Director disagreed and ultimately certified IBT as the exclusive collective-bargaining representative of the domestic employees. App. A at 2a-3a; App. C.

The Condominium Association refused IBT's bargaining request, following which IBT filed an unfair labor practice charge, alleging that the Condominium Association's failure to bargain had violated the NLRA. App. A at 3a. The NLRB's General Counsel issued a complaint, based on the Condominium Association's purported violation of Sections 8(a)(5) and (1) of the NLRA. *Id.* On September 30, 2003, the NLRB issued a Decision and Order, in which it granted General Counsel's motion for summary judgment and ordered the Condominium Association to bargain with IBT. *Id.* at 13a-16a.

III. The Court Of Appeals' Decision.

The Condominium Association filed a petition in the Eleventh Circuit Court of Appeals, pursuant to 29 U.S.C. § 160(f), seeking to set aside the NLRB's decision on the grounds that the NLRB had erred in failing to hold that the employees in question were domestic employees within the meaning of Section 2(3) of the NLRA. App. A at 3a-4a. On February 28, 2005, the Eleventh Circuit issued its opinion, denying the Condominium Association's petition and granting the NLRB's cross-petition to enforce the September 30, 2003 Decision and Order. *Id.* at 4a-8a. The Eleventh Circuit held that NLRB decisions distinguished domestic employees excluded from coverage by the NLRA who worked for single homeowners and single families, from those eligible for unionization who

worked in a condominium. *Id.* at 5a-8a. Because of its prior ruling, the Eleventh Circuit decided that employees who worked for a condominium association, rather than individual unit owners, would not be regarded as domestic employees. *Id.* at 6a-7a. The Court also found that its decision in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 121 S. Ct. 1861 (2001) ("*Kentucky River*") did not require the Court to reverse its decision involving and affirming the NLRB jurisdiction over condominium employees. App. A at 7a. The Eleventh Circuit finally, rejected the other arguments, concluding that there was substantial evidence to support the NLRB's decisions that the individuals involved were not domestic employees within the meaning of Section 2(3) of the NLRA. *Id.* at 7a-8a.

REASONS FOR GRANTING THE PETITION

I. The Domestic Service Exclusion Under Section 2(3) Of The NLRA Precludes The Unionization Of Individuals Employed In The Domestic Service Of Families Or Persons At Their Homes, When Such Families Or Persons Live In Condominiums, A Form Of Home Ownership Recognized Under Florida Law.

The NRLB cannot circumvent the domestic service exclusion under Section 2(3) of the NLRA, 29 U.S.C. § 152(3), under which unions, such as IBT, are prohibited from representing anyone who is, as a matter of definition, employed "in the domestic service of any family or person at his home." 29 U.S.C. § 152(3). Condominiums are a form of real property. § 718.102, Florida Statutes (2004). Common ownership is fundamental to condominium organization and sustainability, particularly in the case of a non-profit condominium association. § 718.111, Florida Statutes (2004).

The Condominium Association is a group of homeowners who, as a matter of law, are able to directly employ individuals in domestic service of families and persons living in homes in a joint fashion (so that they could be vertically stacked). The NLRB has chosen to re-categorize this type of real property as a business to enable unionization of employees in the "domestic service of any family or person at his home" when such family or person lives in a condominium.

According to Florida constitutional and statutory law, homes may be horizontally organized in a block or vertically stacked in a condominium fashion. Therefore, individuals who are working in the homes for families or persons at residential homes in domestic service cannot be organized and represented by the IBT. A court's ruling to the contrary would destroy the concept of homeownership and convert it into a type of industrial relations situation, that would be inconsistent with rights under NLRA and rights inherent to homeownership. For instance, individual condominium homeowners have the ability to obtain homestead exemptions, when they choose to live in such a home and comply with the Constitutional requirements for homestead. They have other statutory rights, and obligations, which the State of Florida and other States can establish. *See, e.g.*, Article VII, Section 6(a) of the Constitution of the State of Florida (granting homestead exemptions to condominium owners).

The NLRA was not intended to extend into the homes of families or individuals. Congress excluded domestic service. Those who were very rich might have had many employees in domestic service, but that does not mean they were in commerce; the law enabling condominiums means owners

who do not possess the wealth of a Rockefeller[2] can have domestic employees in their homes, as they do in the instant case. As a matter of law, there is no difference between a residence on a lot and residential enclave, or condominium. Condominium homes provide a more attainable opportunity and efficiency for homeowners—they may combine living in a vertical neighborhood so their domestic employees can perform maintenance in common areas, work in their homes, and also provide for their security. There would be no public policy[3] reason to oppose this.

Initially, the NLRB did not find it had jurisdiction over condominiums. However, it was first faced with the need to exclude domestic employees from NLRA coverage in *Point*

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2. The fact that a lot of money can be spent on a "home" and its related open spaces does not subject the home to NLRA jurisdiction. *See* the biography of David Rockefeller, which illustrates the various domestics that he grew up with as a young boy at his family estate and then, later, was able to enjoy the benefits from, in his other various estates. DAVID ROCKEFELLER MEMOIRS, by David Rockefeller (Random House 2002), at pages 30-33; 483-485.

3. As a matter of public policy the NLRB should recognize that combinations and concerted activity are essentially not illegal and are provided for by law. However, exclusion of employees from unionization because they work in the domestic service is also the intent and the requirement of the NLRA. As a matter of public policy from a controlled or planned growth approach, it should be noted that density enabled by condominium living creates communities which are of value, as has been well recognized. *See*, *e.g.*, Jane Jacobs, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (The Modern Library 1993); at Chapter 11, 261-289 for "The need for concentration"; *see also* Andres Duany, Elizabeth Plater-Zyberk and Jeff Speck, SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM (North Point Press, New York 2000).

East Condominium Owners Association, Inc. and Service Employees International Union, Local #672, 193 N.L.R.B. 6 (1971). There the NLRB refused to allow a labor organization to organize those in the domestic service working for a condominium association. Subsequent cases, for reasons explained below, distinguished *Point East.* Then, by virtue of administrative and judicial rulings which erroneously overlooked statutory requirements, the NLRB perceived *Point East* as reversed, notwithstanding the distinctions and the dissents as noted in the following analysis of the relevant case law:

A. *Point East Condominium Owners Association, Inc. and Service Employees International Union, Local #672*, 193 N.L.R.B. 6 (1971), as noted, was the initial NLRB reported case involving domestic employees in a condominium, such as the one here. However, it involved an exponentially larger condominium of 1266 privately owned homeowners units as compared to 192 homeowner units here.. The NLRB avoided addressing the issue of domestics, by ruling that it would not take jurisdiction. It accepted the condominium association's argument that the domestics' operations did not "satisfy any applicable established jurisdictional standard." It found that the relationship between a condominium association and the owners was:

> . . . an instrumentality through which the owners have merged together to share collectively in meeting the expenses entailed in maintaining the upkeep and appearance of their property. Accordingly as we are not satisfied, on the record before us, that the relationship between, the Employer and the unit owners is one of doing business, and as the commerce data fails to satisfy

> any other appropriate Board standard, we shall, at this time, decline to assert jurisdiction and shall dismiss the petition.

See Point East Condominium Owners Association, Inc., supra. The Petition before the Court concerns the NLRB's and the Eleventh Circuit's disregard for the precedent set in *Point East.*

B. In *Leisure Village Association, Inc. and Local 806, International Brotherhood of Teamsters*, 236 N.L.R.B. 102 (1978), an advisory opinion was sought because the IBT was apparently seeking representation of an association's employees. The NLRB cited *Point East* as confirming a lack of jurisdiction over condominiums and dismissed a petition for an advisory opinion. Again, the NLRB and the Eleventh Circuit have ignored this precedent in the instant case before the Court.

C. The next case upon which the NLRB and the Eleventh Circuit rely upon is *30 Sutton Place Corporation and Local 32B-32J, Service Employees International Union, AFL-CIO*, 240 N.L.R.B. 752 (1979). *30 Sutton Place* involved different circumstances. The employer there wanted a union and stipulated to a record to assist unionization. The employer was supported by a multi-employer for-profit bargaining association, which represented apartments and buildings, including the co-ops. The multi-employer association, known as the Realty Advisory Board on Labor Relations, already represented 1,700 buildings and had 475 co-ops (and perhaps some condominium buildings included). The multi-employer bargaining association wanted the union to be able to bargain with it, as part of its business. However, the NLRB Regional Director dismissed the Petition due to lack of jurisdiction

based on precedent set in *Point East*, *supra*. As a result, the union and the employer in *30 Sutton Place Corporation* jointly sought review. All parties argued that the NLRB had jurisdiction. The association argued that its for-profit status required it to be treated as any other business. Despite precedent in *Point East* and *Leisure Village Association, Inc. and Local 806, International Brotherhood of Teamsters*, 236 N.L.R.B. 102 (1978), the NLRB took jurisdiction over the for-profit entity.

D. In *Ankh Services, Inc. and Local 50, Service Employees International Union, AFL-CIO-CLC*, 243 N.L.R.B. 478 (1979), relied on here by the NLRB and the Eleventh Circuit, the NLRB also dealt with a private for-profit corporation. That corporation provided in-home service workers under a state funded arrangement. This arrangement was used by the employer to challenge the involvement of a governmental entity which was a "public subdivision exempt under Section 2(2) of the Act". The corporation argued that its in-home service workers were in the domestic service pursuant to Section 2(3) of the Act. The NLRB noted that the homeowners involved were not paying for the domestic services. Furthermore, the NLRB found that only a for-profit employer was involved and it billed the State. The homeowners paid nothing. The service workers were not employed by the homeowners, nor dealing with them directly or indirectly. The NLRB found that these State-funded employees were not individuals employed in the domestic service of any family or person at his home.

E. In *Imperial House Condominium, Inc. and Hotel, Motel, Restaurant & Hi-Rise, Employees & Bartenders Union Local 355, AFL-CIO*, 279 N.L.R.B. 1225 (1986), relied on by the NLRB and the Eleventh Circuit, a building had been

converted to condominiums, but a question remained about the continuing status of the union after the conversion. The previous building owner was in the process of negotiating a new union contract when the condominium conversion occurred. The condominium owners argue that the union and its contract with the previous owners was eliminated upon conversion. The NLRB ruled against the condominium owners based on the case law above and dismissed the applicability of *Point East* and the dissent's reliance thereon. The NLRB compared the condominium involved there to athletic clubs, country clubs and agricultural co-ops and found that this justified the NLRB assuming jurisdiction over the condominium. The Board relied primarily on *30 Sutton Place*, a case inapposite to the facts in *Imperial House*. Chairman Dotson and Member Johansen, in their dissent, noted that *Point East* was controlling:

> Contrary to our colleagues, we would overrule 30 Sutton Place, 240 NLRB 752 (1979), and decline to assert jurisdiction over residential condominiums as was the Board's practice before 1979. *See Point East Condominium Owners Assn.*, 193 NLRB 6 (1971).
>
> Prior to 1979 the Board maintained no jurisdictional standards for residential condominiums and, in fact, had specifically declined to assert jurisdiction over them. *Point East, supra.* The rationale for declining to assert jurisdiction rested on the unique nature of condominiums. Thus, a condominium is composed of a group of individually owned dwellings and jointly owned common areas. In such a relationship, the owners do not provide a product or services to persons other than themselves. Instead, the condominium is a "creature to unit owners" serving

only to allow individual home owners "to share collectively in meeting the expenses entailed in maintaining the upkeep and appearance of their property." Point East, supra. Accordingly, the Board deemed it inappropriate to assert jurisdiction over such entities.

The dissent also noted:

> Because condominiums represent a form of home ownership, rather than a means of doing business, we believe that in 30 Sutton Place the Board also erred in rejecting any analogy between private home owners and condominiums. The fact that condominium owners act collectively does not belie the central fact that their only collective action is their purchase of maintenance and services for their homes and dwellings. Thus, in terms of the specific actions they undertake, condominiums act no differently from individual homeowners.
>
> Because we find apt the analogy between individual home owners and condominium owners, we also find relevant the "domestic employee" exclusion. In so doing, we do not argue that condominium employees are "domestic employees." Rather, we find the exclusion important because it reflects the desire of Congress to insulate private home owners from the requirements and obligations of the Act. In this regard, we simply do not believe that Congress intended to extend the Board's authority to cover efforts, individual or collective, to obtain private home maintenance, repair, or related services.

> In conclusion, we wish to stress that our view is not that the Act precludes assertion of jurisdiction over condominiums. Rather, our experience and our review of the Act's fundamental purposes and objectives convince us that the Board's limited resources will be better utilized by concentrating our efforts on actual business enterprises rather than by seeking to regulate the efforts of individual homeowners to pool their resources in order to secure home and property maintenance service for themselves. Because we believe the decision in Point East better reflects these beliefs and objectives, we would return to that rule.

F. In *NLRB v. Imperial House Condominium, Inc.*, 831 F.2d 999 (11th Cir. 1987), the Eleventh Circuit affirmed the NLRB's decision in *Imperial House Condominium, Inc., supra*, because it found that agency expertise controlled. The court's ruling was based on a unique fact pattern: the labor union involved was already representing employees and, while bargaining for a new contract, the building was converted into a condominium. It was in this specific context that the aforementioned issues were raised. Though the court recognized that the condominium association had stopped bargaining, the court found that the NLRB's expertise and resulting decision was determinative. *See Imperial House Condominium, Inc.*, 831 F.2d at 1005. It concluded that "[b]ecause of the Board's 'special competence' in the field of labor relations, its interpretation of the Act is accorded substantial deference." *Id.* (citation omitted.) The court ignored the dissent in the NLRB's *Imperial House Condominium, Inc.* decision, the precedent in *Point East* decision, and the NLRA exclusion of domestic employees.

G. Finally, the NLRB also relied on *Riverdale Manor Owners Corp.*, 311 NLRB 1094 n.1 (1993); but, that case is illustrative of the erroneous analysis. There, Riverdale Manor Owners Corp. and Zev Pollak Co., jointly controlled and directed by Zev Pollack, the proprietor and president of the board and majority stockholder, operated a "rental facility consisting of 73 rental units." No condominium association or individual ownership of units was involved. Only a profit-making operation of a rental facility was involved. While the Regional Director and the NLRB relied on footnote 1, in that case, footnote 1 merely referred to the NLRB's approach of aggregating gross revenues from residential buildings managed by an employer; and it did not in any way address the question of whether individuals in domestic service were excluded under the NLRA.

While the Eleventh Circuit was deferential, other Circuits have not provided such deference to agencies such as the NLRB. *See Bethlehem Steel Corp. v. U.S. E.P.A.*, 723 F.2d 1303, 1309 (7th Cir. 1983), noting that a Court's deference to an agency's statutory interpretation is based on the principal that such matters

> are more fully understood by specialist agencies . . . And where a statute strikes a political balance but administration of the statute is entrusted to an agency that may not embody that balance, it is dangerous to defer automatically to the agency's view. An agency that may be dominated by one faction in the legislative struggle that led to the enactment of a compromise is not authorized to hand that faction a victory that was denied it in the legislative arena through the efforts of another faction. The court must enforce the compromise,

> not the maximum position of one of the interest groups among which the compromise was struck.

See also remarks of Robert J. Batista, Chairman, National Labor Relations Board, at the 58th NYU Annual Conference on Labor (May 20, 2005), (BNA Daily Labor Report, No. 98, Monday, May 23, 2005, at page 6) (noting that "it is not surprising that Board law changes from time to time. The Board's freedom to act within parameters means that different Boards will act in different ways"). *Cf. A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551, 55 S. Ct. 837, 852 (1935) (J. Cardozo, concurring) ("The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, if I may borrow my own words in an earlier opinion. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440, 55 S. Ct. 83, 79 L. Ed. 645 (1935). This Court has held that delegation may be unlawful though the act to be performed is definite and single, if the necessity, time and occasion of performance have been left in the end to the discretion of the delegate. *Panama Refining Co. v. Ryan, supra.*").

Recently, this Court in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 121 S. Ct. 1861 (2001) rejected the NLRB's result-oriented approach, which ignored statutory definitions (such as occurred with the definition of the domestic exclusion under Section 2 of the NLRA, in the NLRB's departure from *Point East*). The NLRB, in *Kentucky River*, concluded that nurses were not supervisors under the NRLA, although they directed others and used independent judgment. This Court stated that "[t]here is no apparent textual justification for this asymmetrical limitation." *Kentucky*, 532 U.S. at 717. This Court noted that the NLRB

– by its refusal to exclude supervisors from a unit by ignoring the NLRA definition excluding supervisors from coverage – had attempted to insert a type of "startling categorical exclusion into statutory text." *Id. See also*, *Kentucky*, 532 U.S. at 714 (citing *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 481, 121 S. Ct. 903 (2001) ("[T]he agency's interpretation goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear")). The Court found the NLRB's interpretation was without justification and "particularly troubling". *Kentucky River*, 532 U.S. at 716.

Here too the interpretation of the NLRB should focus on the statutory requirements and, at the minimum, follow the *Point East* approach to comply with the NLRA.

II. The NRLB's Assertion Of Jurisdiction Over Domestics Employed Directly By A Non-Profit Condominium Association Is Prohibited By Florida Constitutional And Statutory Provisions And By The United States' Constitutional Provisions.

This Court in *Kentucky River*, *supra*, concluded that the NLRB cannot ignore the language of the statute, as it had tried to do with exclusions for supervisors in the nursing industry. The NLRB cannot ignore the exclusion of domestic employees. This is not only because of the NLRA, but because of the basic concepts of the Constitution, starting with the premise of the Constitution regarding State sovereignty and federalism. Florida by its Constitution and statutes enables a residential home to use a condominium legal structure, so that homes can be legally stacked, or established in a residential condominium association of owners. Ignoring Florida law by taking jurisdiction over those in domestic service, violates State sovereignty. This was

recently confirmed by the majority opinion of Justice Thomas in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 122 S. Ct. 1864 (2002). Justice Thomas noted that states had "residuary and inviolable sovereignty" and that:

> Dual sovereignty is a defining feature of our Nation's constitutional blueprint. States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union "with their sovereignty intact." An integral component of that "residuary and inviolable sovereignty" retained by the States is their immunity from private suits. Reflecting the widespread understanding at the time the Constitution was drafted, Alexander Hamilton explained,
>
> > It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State of the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States. . . .
>
> States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by sister States or by the Federal Government. Nevertheless, the Convention did not disturb States' immunity from private suits, thus

> firmly enshrining this principle in our constitutional framework. "The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity."[4]

Justice Thomas also stated that the preeminent purpose of state sovereign immunity is to accord states the dignity consistent with their status as sovereign entities:

> The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. . . . [t]he founding generation thought it "neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons." . . . The affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court.[5]

The federal agency's jurisdiction was invalidated by the Supreme Court for reasons explained in Justice Thomas' majority decision.[6] Thus, if the interpretation argued for here were to take effect, the sovereignty of the State of Florida – in terms of its interests in protecting its residents – would be

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4. *FMC v. South Carolina*, 122 S. Ct. at 1870 (citations omitted).

5. *FMC v. South Carolina*, 122 S. Ct. at 1874.

6. *FMC v. South Carolina*, 122 S. Ct. at 1868.

destroyed. This is not only because condominiums, as noted above, are provided for under State statute but, in the case of Florida, condominiums are even recognized in the Florida Constitution as enabling a family or person to have homeownership in a condominium to qualify for homestead exemption. *See* Article VII, Section 6 of the Constitution of the State of Florida which provides for Homestead exemptions, in subsection (a), for "every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner" and exempts them from taxation up to an amount of $5,000.00. The Florida Constitution states that "the real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, ..." Thus, ignoring the United States Constitutional prohibition against destroying State sovereignty here would mean that the NLRB would employ an interpretation contrary to federal Constitutional guarantees. The Ninth and Tenth Amendments also preclude the denial of the reserved rights which the NLRB's incorrect approach attempts to enable here.

In addition, the IBT, if it were to represent the owners of such residential units in bargaining, could be in the following situation:

1. The IBT could demand money, which could be the "taking" of property of the homeowners, because the NLRA would be interpreted to allow a strike to withhold services, in order to obtain money from the homeowners, in a way that would be inconsistent with the Fifth Amendment to the United States Constitution. *See, e.g., Lingle v. Chevron, U.S.A., Inc.*, No. 04-163 (U.S. May 23, 2005).

2. By virtue of the NLRA, the IBT could strike, and shutdown the ability of someone to live in their home, which in addition to violating the other Constitutional rights could be a denial of due process, in violation of the Fifth Amendment (insofar as the NLRB would be authorizing such a result). *Cf. Mathews v Eldridge*, 424 U.S. 319 (1976), as well as the Ninth and Tenth Amendments.

In addition to the Constitutional and statutory restrictions, there is no point in promoting the IBT effort to organize the condominium residences involved here, because of any arguable public policy. The NLRA specifically prohibits this result, by excluding domestic employees. Thus, even if the NLRB were "mission-oriented" and wanted to expand unions in America, the controlling statute would prohibit the result. If Congress decides that it wants to change the law, then Congress may legislate to do so; but, the NLRB cannot do so by erroneous rulings. *See Kentucky River, supra.* In addition, there is no public policy that would suggest that the NLRB needs to impose collective bargaining agreements and the approach that is used for trade and business unionization. Assuming for the purpose of argument that the NLRA, in other sections, promotes unions, to do so in homes here would constitute, as noted, a taking and denial of property rights and would improperly put homeownership in jeopardy. In addition to express exclusion in the NLRA of domestics, the following should be considered (in addition to the Constitutional and statutory legal prohibitions):

1. "Putting America's houses in order" is not going to be achieved by having unions organize homeowners. The results as can be seen from the recent experiences in the airline industry, which show that effective unionization will drive up costs. *See* Micheline Maynard, *More Than Money's*

at Stake in Votes By Airline Unions, NEW YORK TIMES, Tues., April 29, 2003, page C1, col. 5 (noting the inflationary union work rules and practices). In addition, unlike the airline industry, there is no way to have a non-union competitor home, or residence. People could not clone themselves, or have comparative shopping, or move their condominium ownership away. The homes involved here are also tied together by law, and are assessed for the expenses of maintenance and security. Imagine bargaining with the IBT and indicating that there were problems, and having the IBT ask for financial information – because of the nature of the statement by someone acting on behalf of the homeowners to the effect that they could not afford to pay more. Would individual IRS tax returns have to be turned over, since the money for the domestic employees involved here comes right from the pockets of the homeowners? Would how deep, or shallow, those pockets are then be relevant?

2. Does the NLRB have the right to change land use policy and eliminate the advantages of living in a condominium, contrary not only to environmental planning and land use adopted by states and local governments but also, contrary to the Constitutional guarantees and statutory guarantees of the State of Florida related to real property ownership? *See also* Justice Douglas' opinion in *City of Memphis v. N.T. Green*, 451 U.S. 100, 127 (1981) (regarding the interest in protection and tranquility and noting "the accepted view that a man's home is his castle").

Since the National Labor Relations Act prohibits the unionization of those who are working for an individual or a family in their home and Florida's constitutional and statutory provisions have created a form of property ownership which includes a condominium to enable homeowners to live in condominiums, the decision below is incorrect.

CONCLUSION

For all the foregoing reasons, Petitioner Condominium Association requests that the Supreme Court grant a review of this matter.

Respectfully submitted,

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